

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

VS

CONSOLIDATED RAIL CORPORATION

DOCKET NO. 422

STATEMENT OF CLAIM:

1. The dismissal of Claimant Joel P. Vincent was arbitrary and capricious, unreasonable and without just and sufficient cause.
2. Claimant Vincent be exonerated of all charges and re-stored to service, with seniority, vacation rights and compensation, and should enjoy all those benefits that he previously enjoyed prior to his dismissal.

OPINION OF BOARD:

Claimant was tried on, found guilty of, and disciplined by discharge for the following charges:

- "1 - Failure to report for duty on your regular assignment at 7:00 A.M., September 28, and September 29, 1978.
- 2 - Engaging, abetting and participating in an unauthorized work stoppage at Canton, MW Shop at 8:00 A.M., 4:05 P.M. and 5:30 P.M. on September 29, 1978."

The disciplinary termination was imposed on Claimant because of his alleged participation in an illegal and unauthorized strike at Carrier's Canton, Ohio, Maintenance of Way Shop on September 28 and 29, 1978 by members of Local 3050 of the Brotherhood of Maintenance of Way Employees employed there.

We have described the general circumstances of this strike and picketing situation revealed at the hearings thereon in our previous Award No. 1, as well as our opinions on certain procedural and substantive questions raised by Organization there as well as here.

Turning to the particular facts of the instant situation, the record shows:

1. It is not disputed that Claimant failed to appear for and perform his scheduled work as a first trick M.W. Repairman at the Canton Maintenance of Way Shop on September 28 and 29, 1978.

2. Cost Analyst D. Masucci testified that Claimant was recognized by him as one of four strikers and picketers congregated at the main entrance of the Shop at about 8:00 A.M. on September 29, 1978.

3. Shop Engineer R. Campitella testified that he recognized Claimant in the company of strikers and picketers at the entrance to the plant at approximately 4:05 P.M. on September 29, 1978.

4. Assistant Equipment Engineer L. Dubois testified to the same effect as Mr. Campitella.

5. Equipment Engineer E. Waggoner testified that at approximately 5:30 P.M. on the same date he saw Claimant among a group of striking employees at the Broadway entrance to the Shop at a place where "On Strike" picket signs were on display.

6. However, the foregoing testimony was, for the most part, developed at the trial held on October 24, 1978, while Claimant and his representative were absent from the proceedings. The trial record shows that this came about, as follows:

a. Claimant was asked by trial officer at the outset of hearing whether and by whom he was represented, in accordance with his rights thereto. He responded that he was represented by Mr. M. W. Phillips District Chairman, although Mr. D. H. Wheeler, another District Chairman, was identified by him as an additional representative.

b. Claimant was then asked which of these two was to be his spokesman and he responded, "Mr. Phillips."

c. At this point trial officer notified Mr. Wheeler that he was not to "take part or participation in this trial in any manner. Your participation will be strictly as an observer."

d. Mr. Phillips thereupon protested that such denial was in violation of Rule G-250 and that he therefore took exception to the ruling.

e. After a continued interchange between trial officer and Mr. Phillips in which they reiterated these statements, Mr. Phillips announced that "the employee and myself request to declare this a mistrial and release ourselves from the proceedings."

f. Trial officer then proceeded to question Claimant, during which questioning Claimant acknowledged that he had failed to report to his regular assignment at the Canton Shop on September 28 and 29, "because there was a strike on" denoted by pickets and a strike sign. He denied, however, that he had "participated, engaged in or abetted" the strike or was a member of the picket line.

g. At this point Mr. Phillips advised Claimant that his Union had provided him with two representatives, subject to the terms of the Agreement and asked him whether he desired representation by both. He reported that he did.

h. Proceedings continued while Claimant was asked by District Chairman Phillips whether he had arrived at the entrance to the Canton Shop on September 28 and 29, 1978 ready to work. He answered in the affirmative. He was then asked by Mr. Phillips why he had not worked on those days. Claimant responded that "there was a sign up." He then responded affirmatively to a question from Mr. Phillips asking whether, to the best of Claimant's knowledge, all employees of the Shop scheduled to work 7:00 A.M. to 3:30 P.M. were obeying such sign by not reporting for work. Claimant also denied that he had engaged in, abetted or participated in any unauthorized work stoppage at Canton at 8:00 A.M., 4:05 P.M. and 5:30 P.M. on September 29, 1978.

i. Mr. Phillips then announced that he had no further questions but was turning the questioning over to District Chairman D.H. Wheeler, Jr.

j. Trial officer then refused to allow Mr. Wheeler to act as a second questioner, inviting Mr. Phillips to continue the questioning, if he wished.

k. Mr. Phillips then announced that, because of the actions of trial officer, "I therefore declare this trial as a mistrial, unfair and partial, and I, myself accompanied by the employee refuse to answer any questions."

l. After the trial officer then addressed a question to Claimant but before an answer was given, Mr. Phillips announced that he was calling a short recess to confer with Claimant.

m. After the recess was ended and hearing officer repeated his earlier question to Claimant, the latter announced: "I refuse to answer any more questions for this is not a fair trial because I can't choose my own legal representation." Thereupon Claimant left the trial room in company with Messrs Phillips and Wheeler, but the trial was resumed thereafter in their absence.

Organization takes the position that the actions of the trial officer were in denial of representation of Claimant by a "duly accredited representative" as provided for in Rule 5-C-1(b) in the Agreement between the parties and, accordingly, Claimant was denied a "fair and impartial" trial.

Rule 5-C-1(b) provides that Claimant, "If he desires to be represented at such trial ... may be represented by the duly accredited representative" ... as defined in Rule 7-H-1. Rule 7-H-1 provides: "The term 'duly accredited representative' as used in this Agreement, shall be understood to mean the District Chairman or System officer of the organization signatory hereto."

In the hearing involved here, Claimant was asked by whom he was represented. He named two District Chairmen, but then stated that one of them--Mr. Phillips--would be his spokesman. Trial officer sought to do no more than hold him to his choice, one that complies with the pertinent Rules. In refusing additional simultaneous

active involvement by a second District Chairman, trial officer acted within the rules and within his procedural rights for assuring an orderly, expeditious and fair process.

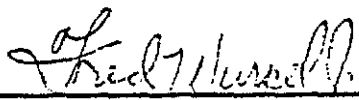
Accordingly, we deny and dismiss Organization's procedural objection in this respect.

As to the merits of the claim, we find Carrier justified in deciding that Claimant was guilty of the subject charges to the extent and kind justifying imposition on him of the discharge penalty.

A W A R D

Claim denied.

  
LOUIS YAGODA, CHAIRMAN & NEUTRAL

  
FRED WURPEL, JR., ORGANIZATION MEMBER

  
N.M. BERNER, CARRIER MEMBER

DATED November 2, 1979.